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No. 88-1942

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO BERNAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent suggests that we have "manufactured an illusory conflict" among the circuits and have mischaracterized the harmless error framework applied by the court of appeals in this case as "inflexible and artificial." Br. in Opp. 8. Those contentions are without merit.

The conflict among the circuits is manifest, as is clear from the following comparison between the approach taken by the court of appeals in this case and that taken by the Seventh Circuit in *United States* v. *Ray*, 828 F.2d 399, 405 (1987), cert. denied, 108 S. Ct. 1233 (1988):

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"In *United States* v. *Dayton*, * * * we held *en banc* that a failure by the district court to address Rule 11's core concerns required automatic reversal. * * * In appeals predicated on a failure to comply with Rule 11 —other than a failure to address the core concerns—we apply a harmless error analysis." Pet. App. 4a.

Ray

"A district court's failure to comply with Rule 11(c)(1) is harmless error 'where it can be said from a review of the proceedings that the defendant nevertheless understood the charges.' * * * Whether the defendant has understood will 'vary from case to case, depending on the complexity of the charges and the personal characteristics of the defendant—including age, education, intelligence, alacrity of his responses, and whether he's represented by counsel.'" 828 F.2d at 405.

The automatic reversal rule that the Fifth Circuit adopted in *United States* v. *Dayton*, 604 F.2d 931 (1979) (en banc), cert. denied, 445 U.S. 904 (1980), is inconsistent with Rule 11(h) because it forecloses consideration of the kinds of facts referred to in *Ray*. In this case, for instance, the Fifth Circuit reversed respondent's conviction without considering the nature of the offense, a simple drug distribution charge; the personal characteristics of the defendant, including his education, employment, and fluency in English; and his sworn responses to questions based upon the written plea agreement. Under *Ray*, all of those circumstances would have been relevant to the issue whether any deficiency in the guilty plea proceeding affected respondent's substantial rights. Because the *Dayton* rule precludes consideration of those factors, it departs from the well-established harmless error principles that Rule 11(h) makes applicable to guilty pleas. See *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986) (harmless error inquiry "requires a review of the entire record").

Contrary to respondent's contention (Br. in Opp. 6-8), nothing in the Advisory Committee note accom-

panying Rule 11(h) suggests that courts may dispense with a review of the particular facts of a case based solely upon the nature of the Rule 11 violation in issue. By its terms, the rule applies to "any variance" from the procedures prescribed by Rule 11. While the Advisory Committee provided some examples of the Rule's operation and cautioned against acceptance of "extreme or speculative harmless error claims" (Advisory Committee note (1983 Amendment) to Fed. R. Crim. P. 11(h), 18 U.S.C. App. at 988 (Supp. IV 1986)), the drafters plainly did not suggest that any category of error should trigger "automatic reversal."

2. Respondent also contends that this Court should not grant certiorari on the harmless error question presented in the petition because his conviction was subject to reversal on another ground. He argues that his guilty plea was invalid because it was based on mistaken advice as to the possible term of post-release supervision and a misapprehension, shared by the government and the district court, as to the effective date of the statute under which he was sentenced, Section 1002 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 95-570, 100 Stat. 3207-3 to 3207-4, 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). Br. in Opp. 10-11. Accordingly, he suggests that his conviction would have to be reversed regardless of the correctness of the Fifth Circuit's analysis of the question presented by the petition. These contentions are without merit, and do not justify denial of the petition.

a. With one possible qualification discussed below, Section 1002 was fully applicable to respondent's offense.[1] Section 1002 was enacted into law on October

[1] With respect to first offenses involving the distribution of 500 grams or more of cocaine, Section 1002 establishes a

27, 1986. Because the Anti-Drug Abuse Act contained no provision postponing the effective date of that Section, the courts of appeals have uniformly held that the increased terms of imprisonment and fines that it authorizes are applicable to all offenses committed after that date. *United States* v. *Levario*, 877 F.2d 1483, 1487 (10th Cir. 1989); *United States* v. *Padilla*, 869 F.2d 372, 381-382 (8th Cir.), cert. denied, 109 S. Ct. 3223 (1989); *United States* v. *Meyers*, 847 F.2d 1408, 1414-1416 (9th Cir. 1988). See *United States* v. *Posner*, 865 F.2d 654, 659-660 (5th Cir. 1989) (upholding sentence imposed under Section 1002 for offense committed between October 27, 1986, and November 1, 1987); *United States* v. *Whitehead*, 849 F.2d 849, 858-860 (4th Cir.) (same), cert. denied, 109 S. Ct. 534 (1988); *United States* v. *Brandon*, 847 F.2d 625, 630-631 (10th Cir.) (same), cert. denied, 109 S. Ct. 510 (1988); *United States* v. *Smith*, 840 F.2d 886 (11th Cir.) (same), cert. denied, 109 S. Ct. 154 (1988); *United States* v. *Levy*, 865 F.2d 551, 559 n.4 (3d Cir. 1989); see also *United States* v. *Portillo*, 863 F.2d 25, 26-27 (8th Cir. 1988) (noting the unanimous position of other courts but reserving judgment on the question). Respondent is therefore wrong in asserting (Br. in Opp. 10) that Section 1002 is inapplicable to offenses committed prior to November 1, 1987.[2]

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mandatory minimum term of imprisonment of 5 years and a maximum term of 40 years; prohibits probation, suspended sentences, and parole; and permits imposition of a fine on an individual of up to $2,000,000. 100 Stat. 3207-3 to 3207-4.

[2] *United States* v. *De Los Reyes*, 842 F.2d 755 (5th Cir. 1988), and *United States* v. *Byrd*, 837 F.2d 179 (5th Cir. 1988), upon which respondent relies (Br. in Opp. 10), address only the availability of *supervised release* for offenses

In this case, respondent entered a plea of guilty to a count alleging that he distributed a kilogram of cocaine on August 2, 1987. Pet. 15 n.9. Because that offense was committed after Section 1002 became effective, the prison terms and fine authorized by that section were applicable. At the plea proceeding, the trial court correctly advised respondent of those potential penalties as modified by the plea agreement's 15-year cap on imprisonment. Pet. App. 23a. Thus, the district court, the prosecutor, and respondent were not mistaken as to Section 1002's applicability, and respondent was under no misapprehension as to the plea agreement's effect on the period of incarceration to which he was exposed.[3]

b. The only possible qualification to Section 1002's applicability to this case concerns the issue of the post-release supervision authorized for respondent's offense. Before respondent offered his guilty plea, the district court advised him that his sentence would include a four-year term of supervised release (Pet. App. 23a), and the court included that sanction in his sentence (C.A. R.E. 16). By its terms, Section 1002 mandates a term of "supervised release" of between four years and life for respondent's offense. However, Section 211 of the Sentencing Reform Act of 1984, 18

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committed before November 1, 1987. Consistent with the decisions of all other courts of appeals, the Fifth Circuit has recognized that prison terms may be imposed under the 1986 statute for offenses committed prior to that date. See *United States* v. *Posner*, 865 F.2d at 659-660.

[3] By entering that agreement, respondent obtained the dismissal of three counts and reduced his exposure to imprisonment without possibility of parole on the remaining count from 40 years to 15 years. Compare Pet. App. 13a with 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986).

U.S.C. 3583 (Supp. IV 1986), which specifies the characteristics of this form of post-release monitoring, did not become effective until November 1, 1987. As a result, the courts of appeals have divided on the question whether this sanction may be imposed for an offense, like respondent's, that was committed after the effective date of Section 1002, October 27, 1986, but before November 1, 1987. Compare *United States* v. *Levario*, 877 F.2d at 1487-1488; *United States* v. *Portillo*, 863 F.2d at 26; *United States* v. *Whitehead*, 849 F.2d at 860; *United States* v. *Smith*, 840 F.2d at 889-890; *United States* v. *Byrd*, 837 F.2d 179, 180-182 (5th Cir. 1988), with *United States* v. *Torres*, 880 F.2d 113 (9th Cir. 1989).

Because the court of appeals reversed respondent's conviction on account of what it found to be an inadequate explanation of the nature of his offense, the court did not address his contention that he could not lawfully be sentenced to a term of supervised release. See Pet. App. 2a n.2. Accordingly, if this Court grants certiorari and reverses the judgment of the court of appeals, that court will have to address the question whether respondent must be resentenced. The fact that that issue might have to be addressed on remand, however, does not affect the appropriateness of this case for this Court's review, since it affects only respondent's sentence and casts no doubt on the validity of his guilty plea and conviction.

Even if respondent could not be sentenced to a term of supervised release (thus rendering the district court's advice concerning his exposure to that form of post-release supervision incorrect), respondent's guilty plea would remain valid. Since respondent was prepared to plead guilty to an offense that, he was ad-

vised, would carry a term of four years of post-release supervision, he necessarily would have been willing to plead guilty if he had known that no post-release supervision would be forthcoming. See *United States* v. *Molina-Uribe*, 853 F.2d 1193, 1198-1199 (5th Cir. 1988).[4] In short, this case squarely raises the question presented by the petition, and that question merits this Court's review.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1989

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[4] As respondent notes (Br. in Opp. 10), the district court mistakenly suggested that the maximum term of post-release supervision authorized by Section 1002 is four years, rather than life. However, since respondent was sentenced to no more than the maximum term of which he was advised, that error would be harmless even if respondent's conviction and sentence were upheld. See *United States* v. *Khan*, 869 F.2d 661 (2d Cir. 1989); *United States* v. *Sheppard*, 588 F.2d 917 (4th Cir. 1978) (per curiam); Advisory Committee note (1983 Amendment) to Fed. R. Crim. P. 11(h), 18 U.S.C. App. at 989 (Supp. IV 1986).

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